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No. 08-906

In the Supreme Court of the United States

JOSEPH AFANWI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment affords an alien a right to relief based on the ineffective assistance of privately retained counsel in the course of seeking judicial review of a final order of removal entered by the Board of Immigration Appeals.

2. Whether the Board of Immigration Appeals has jurisdiction to reopen proceedings to afford relief from his counsel's failure to file a timely petition for review with the court of appeals of the Board's final order of removal.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 526 F.3d 788. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 23a-25a) is unreported. Earlier decisions of the Board of Immigration Appeals (Pet. App. 26a, 27a-29a) and the immigration judge (Pet. App. 30a-71a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2008. A petition for rehearing was denied on August 19, 2008 (Pet. App. 1a-2a). On October 27, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 16, 2009, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a refugee, the Secretary or the Attorney General "may," in his or her discretion, "grant asylum" in the United States. 8 U.S.C. 1158(b)(1)(A). In addition to the discretionary relief of asylum, mandatory withholding of an alien's removal from the United States is available "if the Attorney General decides that the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). An applicant bears the burden of establishing that he or she is a refugee eligible for asylum or that his or her life or freedom would be threatened so as to warrant withholding of removal. 8 C.F.R. 208.13(a), 208.16(b).

A person who is present in the United States and fears torture if removed to a particular country may obtain protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. The CAT has been implemented through Department of Justice regulations. See 8 C.F.R. 1208.16-

1208.18; see also Foreign Relations Authorization Act, Fiscal Years 1998 and 1999, Pub. L. No. 105-277, Div. G, Subdiv. B, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note). To obtain protection under the CAT, an alien must demonstrate that it is more likely than not that he or she would be tortured in the country of removal. 8 C.F.R. 1208.16(c)(3).

2. a. Petitioner, a native and citizen of Cameroon, entered the United States in July 2002 as a non-immigrant visitor with authorization to remain in the United States until January 23, 2003. Pet. App. 4a, 31a. On January 20, 2003, petitioner filed an application for asylum, withholding of removal, and CAT protection with the former Immigration and Naturalization Service (INS). *Id.* at 4a. An asylum officer referred petitioner's application to an immigration judge (IJ). *Id.* at 4a, 60a. On March 11, 2003, the INS initiated removal proceedings by filing a Notice to Appear, alleging that petitioner was removable under 8 U.S.C. 1227(a)(1)(B) for remaining in the United States longer than permitted. Pet. App. 4a-5a, 31a.

b. On July 22, 2004, the IJ denied petitioner's application for asylum, withholding of removal, and CAT protection on account of petitioner's lack of credibility. Pet. App. 30a-71a. The IJ found that there were significant discrepancies between petitioner's original and amended affidavits and inconsistencies between petitioner's account of mistreatment and his mother's affidavit. *Id.* at 62a-63a. In addition, the IJ determined that petitioner's testimony was improbable and uncorroborated, and that the corroborating evidence that petitioner did provide was inconsistent, of little evidentiary value, and lacking in detail. *Id.* at 64a-67a. The IJ thus found that petitioner failed to prove that he had been arrested and

harmed, or that he had escaped from prison and was wanted by governmental authorities in Cameroon. *Id.* at 68a. The IJ also found that petitioner's claims of country-wide persecution in Cameroon were not reasonable. *Id.* at 69a. Accordingly, the IJ denied petitioner's asylum-related claims and, for similar reasons, his claims for withholding of removal under the INA and the CAT. *Id.* at 67a-71a.

3. a. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (Board). See Pet. App. 27a. Petitioner's counsel, Daniel M. Fisher-Owens, later filed a notice of appearance with the Board, listing his address as follows:

> Berliner Corcoran & Rowe, L.L.P.
> 1101 17th St. NW, Suite 1100
> Washington, DC 20036

Admin. R. 143 (A.R.). Thereafter, the Board issued a briefing schedule and mailed it to the following address:

> Daniel M. Fisher-Owens
> 1101 17th Street NW
> Suite 1100
> Washington, DC 20036-0000

A.R. 141-142. On June 23, 2005, petitioner filed his brief with the Board, including a copy of the briefing schedule. A.R. 115-117.

b. On November 29, 2005, the Board dismissed petitioner's appeal. Pet. App. 27a-29a. The Board concluded that the IJ did not err "in her conclusion that [petitioner had] not presented sufficient evidence or sufficiently credible testimony in support of the claim." *Id.* at 29a. The Board served its decision on petitioner's counsel at the same address it had used to serve the briefing schedule. *Id.* at 5a, 10a nn.14 & 15. Petitioner

did not file a timely petition for judicial review of the Board's November 29, 2005 decision. *Id.* at 5a.

c. On January 12, 2006, petitioner filed a motion with the Board requesting that it reissue its November 29, 2005 decision. A.R. 89; Pet. App. 5a. In his motion, petitioner observed that the Board's decision had been mailed to his attorney, but that the address omitted his attorney's law firm's name. *Id.* at 5a, 10a & n.14. Petitioner argued that the incomplete address "could have delayed delivery" of the Board's decision, *id.* at 5a, but he noted he could not confirm that fact, because counsel had transferred offices and did not routinely check his mail between the time the order was mailed and January 6, 2006. A.R. 91; see Pet. App. 9a-10a. Petitioner argued that it would "be unfair to penalize [him] for counsel's failing," and requested that the Board use its "discretionary and equitable powers to rescind and reissue" its prior decision. A.R. 93; see Pet. App. 10a-11a.

On February 13, 2006, the Board denied petitioner's motion to reissue its November 29, 2005 decision because the decision had been mailed to the address previously provided by counsel and there was no error attributable to the Board in serving the decision. Pet. App. 26a.

d. On February 27, 2006, petitioner—acting through new counsel—filed a motion to reopen with the Board, claiming that he received ineffective assistance of counsel due to his prior attorney's failure to file a timely petition for review of the Board's November 29, 2005 decision, and also arguing that new evidence relating to his asylum claim warranted reopening of his proceedings. A.R. 6; Pet. App. 5a, 23a.

The Board denied petitioner's motion to reopen on May 12, 2006. Pet. App. 23a-25a. With respect to peti-

tioner's claim of ineffective assistance of counsel, the Board found that it lacked jurisdiction over a claim based on "any ineffective assistance the [alien] received subsequent to the final order of the Board and in connection with an appeal of the Board's decision." *Id.* at 24a. The Board observed that petitioner had attempted to comply with the procedural requirements under *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988), but found that it could review due process claims only as they pertained to "proceedings before the Immigration Judge or the Board" itself.[1] Pet. App. 24a. With respect to petitioner's request to reopen the proceeding on the basis of new evidence, the

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[1] In *Lozada*, the Board held that an alien's motion to reopen based on the alleged ineffective assistance of counsel should be evaluated in light of the following three requirements: (1) the motion should be "supported by an affidavit" from the alien setting forth, among other things, "the agreement that was entered into with former counsel with respect to the actions to be taken * * * and what counsel did or did not represent to the [alien] in this regard"; (2) the "former counsel must be informed of the allegations [leveled against him] and allowed the opportunity to respond"; and (3) the motion should reflect "whether a complaint has been filed with appropriate disciplinary authorities" with respect to any violation of counsel's "ethical or legal responsibilities" or an explanation for why one was not filed. See *In re Lozada*, 19 I. & N. Dec. at 639. The *Lozada* factors would have been partially superseded on a prospective basis by Attorney General Mukasey's initial decision earlier this year in *In re Compean*, 24 I. & N. Dec. 710, 741-742 (2009) (prescribing new filing requirements with respect to alien's motions addressing counsel's deficient performance, but providing that the *Lozada* factors would continue to apply to motions filed before the Attorney General's decision). On reconsideration, however, Attorney General Mukasey's opinion in *Compean* was vacated, and in a new opinion Attorney General Holder ordered the initiation of a Department of Justice rulemaking to evaluate whether the *Lozada* administrative framework for considering claims based on allegedly deficient performance by counsel should be revised. *In re Compean*, 25 I. & N. Dec. 1, 3 (2009).

Board found that, although the evidence was new and previously unavailable, it failed to remedy "the shortcomings of [petitioner's] claim, such as his lack of credibility, and further fail[ed] to establish that he is prima facie eligible for relief." *Ibid.* Accordingly, the Board denied petitioner's motion to reopen. *Id.* at 25a.

4. On February 27, 2006, petitioner filed a petition for review in the court of appeals, seeking review of the Board's November 29, 2005 denial of his applications for asylum, withholding of removal, and CAT protection. Pet. App. 6a. He later filed a "corrected" petition for review, also seeking review of the Board's February 13, 2006 denial of his motion to rescind and reissue. *Ibid.* He further amended his petition for review on June 8, 2006, to request review of the third Board decision (denying his motion to reopen). *Ibid.* The court of appeals denied the petition for review of all three Board decisions on May 19, 2008. *Id.* at 3a-22a.

a. With respect to the Board's November 29, 2005 denial of petitioner's applications for asylum, withholding of removal, and CAT protection, the court of appeals held that it lacked jurisdiction because the petition for judicial review had not been filed within the 30-day period allowed by 8 U.S.C. 1252(b)(1). Pet. App. 9a-10a.

b. The court also denied the petition for review regarding petitioner's motion to rescind and reissue the Board's November 29, 2005 decision, concluding that "the decision to rescind and reissue an order of removal is properly left to the discretion of the [Board]." Pet. App. 11a. The court deferred to the Board's decision to deny the motion, because petitioner had not established that the Board was at fault for his failure to receive in a timely way the decision denying his asylum-related claims. *Ibid.*

c. Turning to the Board's denial of petitioner's motion to reopen, the court of appeals affirmed the Board's decision on all grounds. Pet. App. 11a-21a. First, the court concluded that, because "the new evidence" petitioner presented in support of reopening did not "create a well-founded fear of persecution," the Board did not abuse its discretion in denying the motion on the basis of new evidence. *Id.* at 12a.

Next, the court affirmed the Board's determination that it lacked jurisdiction over petitioner's claim that he received ineffective assistance of counsel as a result of counsel's failure to file a petition for review within the 30-day period allowed by 8 U.S.C. 1252(b)(1). Pet. App. 13a-15a. The court recognized that there is "no settled or uniform view," and that the Board itself had "issued contradictory opinions on the subject." *Id.* at 13a. But the court determined that the Board lacked jurisdiction under the governing regulations "over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals," *id.* at 14a, because such an action occurs "before [the] court, not before the Board," *id.* at 15a, and the Board's jurisdiction is limited by regulation to a review of questions or issues "in appeals from decisions of immigration judges." *Id.* at 14a (quoting 8 C.F.R. 1003.1(d)(3)(ii)).

Finally, the court of appeals addressed petitioner's claim of ineffective assistance of counsel based on counsel's failure to file a timely petition for review. Pet. App. 15a-21a. The court concluded that the Constitution does not "guarantee[] effective assistance of counsel to an alien in removal proceedings." *Id.* at 15a-16a. The court reasoned that while aliens have a statutory privilege under 8 U.S.C. 1362 to retained counsel in administra-

tive removal proceedings, and enjoy a Fifth Amendment right to due process in those proceedings, the Fifth Amendment does not entitle aliens to a remedy for the ineffectiveness of their retained counsel, because due process is violated only by wrongful actions of the federal government or an individual engaging in "state action." Pet. App. 16a-19a. The court held that, because petitioner's counsel was a private actor and his alleged ineffectiveness was a purely private act, petitioner had not been deprived of his Fifth Amendment rights. *Id.* at 20a-21a. The court therefore dismissed the petition for review "with respect to [petitioner's] claim of ineffective assistance of counsel." *Id.* at 21a.

DISCUSSION

Petitioner renews his claim (Pet. 17-28) that he has a constitutional entitlement to relief based on the assertedly deficient performance of his privately retained counsel in failing to file a timely petition for judicial review of a final order of removal. Petitioner also renews his claim (Pet. 28-29) that the Board had jurisdiction to grant relief based on his counsel's failure—after the Board had already issued a final order of removal—to file a timely petition for review with the court of appeals. The court of appeals correctly held that there is no constitutional right to effective performance by privately retained counsel in removal proceedings, including on judicial review. But the court erroneously affirmed the Board's conclusion that the Board lacks the power to reopen removal proceedings in order to remedy an attorney's failure to file a timely petition for review of a final order of removal. The Attorney General has since made clear that the Board does have that authority. See *In re Compean*, 25 I. & N. Dec. 1, 3 (2009). Accordingly, the

court of appeals' judgment should be vacated and the case remanded for further consideration in light of the Attorney General's decision in *Compean* that the Board has jurisdiction to provide petitioner with appropriate relief. The court of appeals may then in turn remand to allow the Board to decide in the first instance whether petitioner should be afforded an administrative remedy for the ineffective assistance of counsel he alleges. Because that course could render the constitutional issue moot, and because the case law in the courts of appeals on the constitutional question is still developing, this Court's review of the constitutional question is unwarranted.

1. Petitioner contends (Pet. 17-28) that his privately retained lawyer's failure to file a timely petition for review of his order of removal deprived him of due process in violation of the Fifth Amendment. Further review of that claim on the merits is unwarranted, but this case should be remanded for an opportunity to permit the Board to consider whether, in light of the ineffective assistance of counsel petitioner alleges, the Board should exercise its discretion to grant petitioner's motion to reopen.

a. The court of appeals correctly held that the Fifth Amendment does not confer a right to effective assistance by privately retained counsel in immigration proceedings. As this Court has explained, when the government is not constitutionally required to furnish counsel in the relevant proceedings, the errors of privately retained counsel are not imputed to the government. See *Coleman* v. *Thompson*, 501 U.S. 722, 752-754 (1991). When "[t]here is no constitutional right to an attorney" furnished by the government in a particular kind of proceeding, a client "cannot claim constitutionally ineffec-

tive assistance of counsel in such proceedings"; in that situation, the attorney performs in a private capacity as the client's agent, not a state actor, and the client therefore must "'bear the risk of attorney error.'" *Id.* at 752-753 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). In "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent." *Id.* at 753 (quoting *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962)).

As petitioner implicitly concedes by relying on "the statutory and regulatory policy of encouraging and facilitating aliens in retaining counsel" (Pet. 27), there is no constitutional right to appointed counsel in immigration proceedings. Rather, Congress has provided as a statutory matter that an alien shall have the "privilege" of being represented by counsel of the alien's choice "at no expense to the Government." 8 U.S.C. 1229a(b)(4)(A), 1362; cf. 28 U.S.C. 1654 (parallel provision providing that a party may appear through counsel in any court of the United States). Accordingly, when an alien has invoked that privilege and retained a lawyer to represent him in removal proceedings or in filing a petition for review, counsel's actions are not those of the government, but are instead attributed to the client.

Petitioner contends (Pet. 26) that the "state action" that is needed to find a due process violation in this context arises from the government's reliance on the removal order at the end of the proceeding. But that contention proves too much, because it would preclude the government from relying on any civil court order without exposing itself to the risk of collateral litigation about asserted malpractice on the part of opposing counsel. And petitioner's attempt (Pet. 19-20) to distinguish removal proceedings from other civil litigation fails. He

argues that, because a removal proceeding threatens to impose such a great loss on an alien, it is "barely distinguishable from criminal condemnation" and thus triggers a Fifth Amendment right to the effective assistance of counsel analogous to that available in the criminal context. Pet. 19 (quoting *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996)). This Court, however, has resisted calls to view immigration proceedings as equivalent to criminal trials. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the [immigration] proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."); see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1169 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'") (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893)). And if petitioner is correct that immigration proceedings should be treated like criminal proceedings with respect to issues of legal representation, the Constitution would require the government to furnish counsel to those facing removal proceedings. In the absence of any requirement of that kind, petitioner's claim—concerning only privately retained counsel—has no apparent basis.

b. Petitioner correctly explains (Pet. 11-13) that there is disagreement in the courts of appeals about whether aliens in immigration proceedings have a Due Process Clause entitlement to effective performance by their privately retained counsel. Like the Fourth Circuit in this case, the Seventh Circuit and the Eighth Circuit have held there is no such constitutional right. See *Magala* v. *Gonzales*, 434 F.3d 523, 525-526 (7th Cir.

2005);[2] *Rafiyev* v. *Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008). By contrast, a number of other circuits have suggested or held that the Due Process Clause creates a right to assistance by counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. See *Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601 (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005).[3]

Notwithstanding that disagreement among the courts of appeals, this Court should not resolve the constitutional question at this time. The recent decisions of the Fourth and Eighth Circuits demonstrate that jurisprudence on the issue is still developing in the courts of appeals.[4] And a recent Ninth Circuit decision "as-

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[2] As petitioner notes (Pet. 13 n.1), other Seventh Circuit decisions do contemplate that counsel in immigration proceedings "may be so ineffective as to have impinged upon the fundamental fairness of the proceeding in violation of the fifth amendment due process clause." *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (1998) (quoting *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144 (7th Cir. 1993)). Petitioner also quotes (Pet. 13 n.1) the passing reference to the Fifth Amendment in *Sanchez* v. *Keisler*, 505 F.3d 641, 647 (7th Cir. 2007), but the court's holding there was that the alien "did not have the fair hearing to which *the immigration statutes* entitle her." *Id.* at 649 (emphasis added).

[3] The Fifth Circuit has not decided the constitutional question, but has instead "repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment." *Mai* v. *Gonzales*, 473 F.3d 162, 165 (2006).

[4] Other pending petitions for writs of certiorari challenge later decisions by the Fourth Circuit that rely on the decision in this case. See

sume[d]" without deciding that aliens have "a constitutional right to the assistance of counsel in immigration proceedings." *Alcala* v. *Holder*, 563 F.3d 1009, 1015 n.11 (2009) (expressing no opinion "on the effect of" the Attorney General's later-vacated opinion in *Compean*, discussed at note 1, *supra*). Furthermore, as discussed below, there is no need to resolve the constitutional question because petitioner may receive an administrative remedy of exactly the kind he seeks: If the Board grants petitioner's motion to reopen based on his counsel's failure to file a petition for review, that administrative decision would moot petitioner's constitutional claim.

2. Although the Constitution does not furnish a right to effective assistance by privately retained counsel in removal proceedings, the Attorney General has the authority, in his oversight of the administrative removal process, to afford relief to an alien in circumstances the Attorney General deems appropriate as a matter of discretion, including circumstances attributable to errors by counsel in such proceedings. The Board has recognized an administrative remedy for deficient performance by counsel since at least 1988. And the Attorney General has recently directed the initiation of a Department of Justice rulemaking to consider whether, after twenty years, the *Lozada* factors that govern the Board's administrative resolution of claims of ineffective assistance (see note 1, *supra*) should be revised. Petitioner's case continues to be governed by "the *Lozada* framework and standards as established by the Board before *Compean*," *In re Compean*, 25 I. & N. Dec. at 3,

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Massis v. *Holder*, petition for cert. pending, No. 08-1392 (filed May 8, 2009); *Machado* v. *Holder*, petition for cert. pending, No. 08-7721 (filed Dec. 11, 2008).

but under those standards as well, he may be entitled to administrative relief as a result of his attorney's error.

In this case, the court of appeals disposed of petitioner's claim about his counsel's performance by holding that there is no *constitutional* right to effective assistance of counsel. Pet. App. 21a. Yet, because the court of appeals affirmed the Board's determination that the Board lacked jurisdiction to grant any relief based on counsel's failure to file a timely petition for review in the court of appeals, *id.* at 13a-15a, petitioner never received a decision on the merits from the Board about whether he should be afforded administrative relief from the final removal order because of counsel's error.[5]

Petitioner contends (Pet. 28-29) that the court of appeals erred in concluding that the Board lacks jurisdiction to reopen proceedings on the basis of an attorney's failure to file a timely petition for review in the court of appeals. As petitioner notes (Pet. 14), other circuits have stated that the Board may consider a motion to reopen in such circumstances. And, as the court of appeals noted, the Board "itself ha[d] issued contradictory opinions" on the question. Pet. App. 13a. Since the court's decision in this case, however, the Attorney Gen-

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[5] The question of the Board's jurisdiction to reopen proceedings on the basis of an attorney's failure to file a timely petition for review in the court of appeals is a purely legal question. Accordingly, the jurisdiction of the court of appeals (and therefore of this Court) to remand to the Board to allow it to determine the extent of its discretion in this case is not likely to be affected by any decision this Court renders in *Kucana* v. *Holder*, cert. granted, No. 08-911 (Apr. 27, 2009). Regardless of whether 8 U.S.C. 1252(a)(2)(B)(ii) generally precludes judicial review of the denial of a motion to reopen immigration proceedings (the issue in *Kucana*), the question whether the Board has jurisdiction under the governing regulations to grant relief raises a "question[] of law" that would still be reviewable under 8 U.S.C. 1252(a)(2)(D).

eral has clarified that the Board does have discretion to reopen proceedings on the basis of events that occur after the entry of a final order of removal, including the failure by counsel to file a timely petition for review. See *In re Compean*, 25 I. & N. Dec. at 3; see also, *e.g.*, *Gjondrekaj* v. *Mukasey*, 269 Fed. Appx. 106, 108 (2d Cir. 2008). In light of that clarification, it would be appropriate for this Court to vacate the court of appeals' decision on question two and remand the case to that court to allow the Board to adjudicate petitioner's claim of ineffective assistance unencumbered by the Board's previous conclusion that it lacked jurisdiction to address that claim. Although the Board, because of that erroneous jurisdictional ruling, did not address the merits of petitioner's underlying claim concerning counsel's actions, the Board did recognize that petitioner had "attempted to abide by the procedural requirements established in" *Lozada*. Pet. App. 24a. There thus appears to be some prospect that the Board would entertain his claim on the merits on remand and grant him relief from the harm he suffered as a result of his lawyer's error.

CONCLUSION

With respect to question one, the petition for a writ of certiorari should be denied. With respect to question two, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further consideration in light of the Attorney General's determination in *In re Compean*, 25 I. & N.

Dec. 1, 3 (2009), that the Board has jurisdiction to grant administrative relief in a case such as this.

Respectfully submitted.

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